# Essential Fish Habitat: FAQs

January 2002

## EFH FINAL RULE

**How does the EFH Final Rule change the EFH regulations?** The Final Rule simplifies the EFH regulations by providing clearer guidance and more efficient procedures for Councils, the National Marine Fisheries Service (NOAA Fisheries), and other agencies. Noteworthy changes include:

- Description and Identification of EFH: (1) clearer standards for identifying EFH, including new requirements to refer to geographic boundaries and to provide maps; (2) new guidance encouraging Councils to distinguish EFH from all potential habitats

- Evaluation of Fishing Activities that May Adversely Affect EFH: (1) more specific guidance on what information Councils should provide in the evaluation; (2) clearer standard for deciding when Councils must act to minimize adverse effects

- EFH Consultation Procedures: (1) reinforcement of NMFS' preference for combining EFH consultations with other environmental reviews (e.g., NEPA, Clean Water Act) to promote efficiency; (2) streamlined procedures for developing General Concurrences (which eliminate the need for individual consultations on actions with minimal impacts to EFH); (3) clarification that for relatively simple actions, the federal agency's written assessment of effects to EFH may be very brief

## EFH Designations

**Why is NOAA Fisheries identifying and describing essential fish habitat (EFH) for only those species that are managed under the Magnuson-Stevens Act?** The Magnuson-Stevens Act requires that each fishery management plan (FMP) developed under the Act describe the EFH for that fishery. Based on that language, the final rule calls for the description and identification of EFH for all fish species in the fishery management unit of an FMP, and not for all fish species in federal waters.

**Why has such a large area been identified as EFH?** Over 700 species are managed by NOAA Fisheries under the Magnuson-Stevens Act. In many cases the fishery management councils identified EFH separately for several life stages of each species, since different species and life stages may have different ecological requirements. For individual species or life stages, EFH generally is a distinct subset (often 50 to 70 percent) of the total available habitat, and only includes a portion of the water column (e.g., only bottom habitats or only surface waters). However, when individual EFH designations for all life stages of all managed species are overlaid, the mosaic of designations is indeed broad. NOAA Fisheries is continuing to work with the fishery management councils to revise and refine EFH designations as additional information becomes available.

**Would decreasing the size of EFH result in a corresponding decrease in the number of actions subject to EFH consultations?** Many managed fish species rely on estuaries and nearshore habitats for nursery areas and other important habitat functions during at least one portion of their lives. Likewise, most human impacts to marine habitat occur in the coastal zone, with notable exceptions such as impacts from mineral extraction and marine transportation. Refining EFH designations is not likely to remove many coastal development activities from consideration for potential effects to EFH. While additional information could result in narrowing the areal coverage of EFH in offshore waters, the relative lack of non-fishing threats offshore means that the number of consultations probably would not decrease much.

**Why has EFH been designated in state waters?** The Magnuson-Stevens Act defines EFH as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." NOAA Fisheries interprets that to mean wherever those waters occur, i.e., state or federal waters.

**If an area is identified as EFH, will fishing automatically be prohibited?** No. The final rule states that fishery management councils must act to prevent, mitigate, or minimize any adverse effects from a fishing practice or gear type, if there is evidence that it is having an adverse impact on EFH, to the extent it is practicable to do so.

**Do the Magnuson-Stevens Act EFH provisions give NOAA Fisheries the authority to regulate fishing in state waters?** The EFH provisions do not provide any new authority to regulate fishing in state waters. The requirement for fishery management councils and NOAA Fisheries to minimize adverse impacts from fishing applies to fishing activities that are regulated under a fishery management plan. However, NOAA Fisheries and the fishery management councils may provide states with recommendations on how to minimize adverse impacts to EFH from any fishing that takes place in state waters.

**How are EFH and a Critical Habitat designation under the Endangered Species Act different?** EFH is defined as those waters and substrate necessary to fish for spawning, breeding, feeding and growth to maturity. EFH designations occur only in aquatic areas necessary to support federally managed marine and anadromous fish. Unlike Critical Habitat, upland areas cannot be designated as EFH.

Critical Habitat is designated in conjunction with the listing of a species as "threatened" or "endangered." Critical Habitat includes those specific areas on which are found the physical and biological features that are essential to the conservation of a listed species, and which may require special management considerations. Critical Habitat for fish does not have to be limited to waters and associated substrate. Rather, it can be designated more broadly to include riparian buffer zones and other terrestrial areas adjacent to rivers and coasts.

## EFH Habitat Areas of Particular Concern

**What is the difference between EFH and a habitat area of particular concern (HAPC)?** HAPCs are a subset of EFH. The identification of HAPCs is encouraged in the EFH final rule to allow Councils to highlight specific habitat areas with extremely important ecological functions and/or that are especially vulnerable to degradation. For instance, HAPC designation may be warranted for areas that play a vital role in the reproductive cycle of a managed species, or areas that contain a rare habitat type that may be sensitive to disturbance from fishing or other human activities. Designation of a specific habitat area as an HAPC requires that one or more of the following considerations be met:

- importance of the ecological function provided by the habitat
- extent to which the habitat is sensitive to human-induced environmental degradation
- whether, and to what extent, development activities are, or will be, stressing the habitat type
- rarity of the habitat type

HAPC designation does not confer additional protection or restrictions to an area, but can help to focus EFH conservation priorities. The designation of HAPCs is a valuable way to acknowledge areas where we have especially detailed information on ecological function and habitat vulnerability that allows us to highlight priority areas for conservation and management.

**Aren't the small areas represented by HAPCs what should really be considered "essential" habitat for fish?** No. It is entirely appropriate to designate as EFH the areas that provide necessary environments for managed species to feed, reproduce, and seek shelter from predators. It should come as no surprise that these areas constitute a sizeable portion of the managed species' geographic range. HAPCs, on the other hand, are localized areas of extreme vulnerability or ecological importance. Healthy populations of fish require not only these relatively small habitats, but also other suitable areas that serve the necessary habitat functions to support larger numbers of fish. HAPCs can highlight valuable and/or vulnerable habitats, but alone do not comprise the areas necessary to support healthy stocks of fish.

**From where does NOAA Fisheries derive the authority to designate HAPCs, since this term is not used in the Magnuson-Stevens Act?** The statutory definition of EFH is quite broad, encompassing all habitats necessary for fish to carry out their basic life functions. HAPCs provide a mechanism to highlight areas where more is known about the ecological value and vulnerability of portions of EFH, which can help to prioritize conservation efforts. HAPCs are a logical extension of EFH, and their identification does not exceed the scope of the EFH provisions of the Magnuson-Stevens Act.

## Effects of Fishing on EFH

**Is NOAA Fisheries conducting research on the effects of fishing on EFH?** Studies that demonstrate the short- and long-term impacts of fishing on distinct habitat types in U.S. waters are very limited. Available scientific information suggests that in some complex environments, mobile fishing gear can reduce the structural complexity of fish habitat, making it more difficult for fish to hide from their predators and interfering with benthic (bottom) ecosystem processes. Additionally, some studies have shown a correlation between loss of habitat complexity and a reduction in fish productivity and benthic community biomass, species richness, and diversity. More research needs to be done to assess the effects of fishing on habitat structural complexity, community structure, and ecosystem processes.

NOAA Fisheries Science Centers have significant efforts underway to improve our understanding of the effects of fishing on EFH. We also are pursuing joint research initiatives on the effects of fishing with the U.S. Geological Survey and other organizations, which are designed to provide the information needed to make sound management decisions.

**Have the Fishery Management Councils implemented measures to protect EFH from the impacts of fishing?** All fishery management plans are required to minimize to the extent practicable the adverse effects of fishing on EFH. All 41 existing FMPs have measures, such as gear restrictions and harvest limits, that control fishing effort and thus provide benefits to EFH. The EFH provisions of the Magnuson-Stevens Act ensure that NOAA Fisheries and the fishery management councils evaluate potential habitat impacts explicitly when we develop fishery management measures. This was an important change to the Magnuson-Stevens Act, because it emphasizes that habitat impact must be considered alongside overfishing, bycatch, and other important issues in fishery management. NOAA Fisheries is continuing to work with the Councils to develop additional measures to conserve EFH as more research data on fishing gear impacts become available.

## EFH Consultation

**Why is NOAA Fisheries directing so much effort toward consultations on non-fishing activities?** The Magnuson-Stevens Act requires us to consider the effects of both fishing and non-fishing activities. The Act is very clear in requiring all federal agencies to consult with the Secretary on any action that may adversely affect EFH. Likewise, the Act is clear in requiring NOAA Fisheries to provide EFH Conservation Recommendations on any federal or state action that would adversely affect EFH. Since many non-fishing actions fall into the latter category, we must review and comment on them. Incidentally, NOAA Fisheries also completes EFH consultations for our own actions that may adversely affect EFH, such as the development of regulations for fishery management measures, and even our habitat restoration projects that may cause short-term adverse effects to EFH.

**Why is NOAA Fisheries consulting on federal or state activities that are already regulated under other federal environmental statutes?** The Magnuson-Stevens Act requires the Secretary to consult on any federal or state activity that would adversely affect EFH. There is no provision in the Act that allows NOAA Fisheries to exempt activities that are regulated under other environmental statutes. To address concerns that the EFH requirements will be duplicative of other environmental consultation requirements, NOAA Fisheries has stated in the EFH regulations that the EFH consultation requirements may be combined with other environmental reviews.

**What is NOAA Fisheries doing to streamline EFH consultation for other federal agencies and the public?** NOAA Fisheries is working closely with federal agencies to develop procedures to ensure that EFH consultations are conducted in the most efficient and effective manner possible. These agreements include "findings" to facilitate the use of existing environmental assessment processes to handle EFH consultations; programmatic-level reviews to replace project-specific consultations, as appropriate; and General Concurrences to avoid the need for case-by-case consultation for activities deemed likely to result in no more than minimal impact.

**Why do the EFH regulations require federal action agencies to prepare an EFH Assessment?** The EFH regulations require federal agencies to prepare EFH assessments to evaluate the effects of proposed actions on EFH and associated species of fish. This information is necessary for NOAA Fisheries to fulfill its statutory responsibility to provide EFH Conservation Recommendations. If the action agency did not provide an EFH assessment, in many cases NOAA Fisheries would need to request appropriate information from the action agency to help us evaluate potential effects on EFH, which would protract the consultation process. NOAA Fisheries has a separate statutory obligation to provide EFH Conservation Recommendations regarding any action that would adversely affect EFH, but EFH consultations are most efficient when the action agency first provides NOAA Fisheries with a succinct assessment of the effects of the proposed action on EFH. The EFH Assessment allows us to develop EFH Conservation Recommendations promptly and ensures that the recommendations are based upon complete information about the proposed action.

**Is NOAA Fisheries aware of any significant delays, substantial added costs, or lawsuits that have resulted from EFH consultations?** No. We have polled our field staff repeatedly to identify whether any significant problems have resulted from EFH consultations. We have yet to find a single "horror story." A couple of stories have been brought to our attention about EFH consultations being required for actions far inland or consultations resulting in lengthy delays. When we looked into the facts we found that the stories were not true. If problems do arise, NOAA Fisheries wants to know about them so we can correct the situation, but so far the consultation process has been going very smoothly.

**How does the number of EFH consultations being conducted compare with habitat-related consultations conducted by NOAA Fisheries in previous years under other statutes?** NOAA Fisheries completes about 8,000 EFH consultations per year. Prior to the EFH provisions, NOAA Fisheries commented on potential impacts to fish habitat through the Fish and Wildlife Coordination Act, National Environmental Policy Act, Federal Power Act, and other laws. In recent years the total volume of these non-EFH reviews was in the range of 8,000 to 11,000 actions per year. EFH has not resulted in an increase in the numbers and types of habitat-related consultations that we conduct, although we are consulting on some new activities. Rather, EFH provides a better way to address our concerns in those types of consultations we have historically undertaken.

**If the EFH consultation process is so similar to NOAA Fisheries' role before EFH, why is this new consultation process necessary? What value does it add?** In the past, we found that federal agencies did not typically focus on how proposed actions might affect marine fishery species and their habitats. In many cases we were unsure whether our recommendations were heeded by the responsible agency or why they might have been rejected. The EFH consultation process focuses needed attention on adverse effects to EFH and provides federal agencies with NOAA Fisheries' recommendations on how to avoid or minimize impacts, without a lot of delay or added paperwork. A vital new consideration has been added since federal agencies are now starting to assess specifically the impacts of their actions on the habitats used by federally managed fishery species, and they are responding to NOAA Fisheries' recommendations in their decisions. EFH consultation provides a significant opportunity to influence federal agency decisions involving actions that could affect managed species, and that helps us to sustain productive fisheries.

**Will EFH evolve into the equivalent of the Endangered Species Act (ESA)?** No. The ESA and the EFH provisions of the Magnuson-Stevens Act have distinctly different statutory requirements. One major difference is that EFH Conservation Recommendations are not mandatory, whereas federal action agencies would be in violation of the ESA if they ignore NOAA Fisheries' ESA "terms and conditions" or "reasonable and prudent alternatives." EFH and ESA can complement each other, particularly since efforts to conserve EFH may reduce the need for future threatened and endangered species listings, but these are two separate programs with very different goals. Two major distinctions illustrate this point:

- Reactive *vs*. preventive – The ESA is a last-resort measure to avoid species extinction and restore populations of listed species. EFH conservation helps to ensure the sustainability of fish stocks, and thus could help to prevent the need for ESA listings.

- Binding *vs*. non-binding – Measures to protect ESA listed species or Critical Habitat are basically binding on all entities, whereas recommendations to protect EFH are merely advisory.

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